IN THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

THE FLORIDA BAR,
Complainant,
vs.
F. LEE BAILEY,
Respondent.
_____/

CASE NO. SC96,767
TFB NO.
1996-51,085(15B)
1997-50,110(15B)

EMERGENCY MOTION FOR ABATEMENT OR STAY

Respondent, F. LEE BAILEY, by his undersigned counsel, hereby respectfully requests this Court to grant a stay or abatement of the disciplinary proceeding presently scheduled to commence in this case on May 30, 2000 in the Circuit Court of Collier County before the Honorable Cynthia A. Ellis, Referee, as follows:

Introduction

The Complaint in this Florida Bar ("Bar") disciplinary proceeding was filed on or about October 15, 1999 (AC at 21), and trial is presently scheduled to begin on May 30, 2000 (AA).[1] On May 15, 2000, Respondent filed a Motion to Dismiss or, in the Alternative, to Abate Disciplinary Proceedings Pending Conclusion of Respondent's Litigation in Court of Federal Claims (AB). The motion was heard yesterday, May 23, 2000, and denied (AE at

[1] "A" denotes Respondent's Appendix; reference to appendix items is by letter and internal pagination. All emphasis in this motion is supplied, unless otherwise indicated.

35-6). Respondent now requests this Court to enter a stay or an abatement of the trial.

The Complaint in this case (AC) presents seven allegations; the sixth allegation was dismissed with prejudice following the Bar's filing of a Notice of Abandonment (AA at 2). At the heart of most of the allegations is the nature of the transfer of 602,000 shares of Biochem Pharma stock from Claude Duboc to Respondent while Respondent served as Duboc's counsel in a criminal prosecution in the United States District Court for the Northern District of Florida. The Bar contends that Respondent accepted the transfer as part of an oral trust agreement, whereby Respondent was to serve as trustee of the fund on behalf of the United States. Respondent's contention consistently has been that no trust was created, and that the stock was transferred to him in fee simple. The facts out of which this dispute arose are recited in detail in the first five pages of an Opinion filed on January 21, 2000 by the Honorable Marian Blank Horn, Judge of the United States Court of Federal Claims, Case No. 96-666 (A5).[2]

I.

The Court of Federal Claims case was filed by Respondent as Plaintiff against the United States on October 22, 1996, and in her Opinion Judge Horn denied the government's motion to dismiss for lack of subject matter jurisdiction or for failure to state a claim upon which

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[2] Due to the emergency nature of this motion, Respondent will rely on the recitation of facts in that Opinion, which this Court is respectfully requested to review.

relief may be granted. As the Opinion recites (AD at 5), Respondent's court of claims complaint is in two counts.

The first alleges that, after the stock rose dramatically in value, the Defendant breached an express contract with Respondent by taking action to deprive him of the stock which he maintains was transferred to him in fee simple as consideration for his efforts to repatriate property, owned by Duboc and subject to forfeiture, worth between $50 and $100 million, much of which was situated overseas (AD at 12). The second count alleges that the action of the government's agents created an implied-in-fact contract which was breached by the government's actions to deprive Respondent of the stock, damaging him financially.

The government's motion to dismiss was denied on a variety of grounds. Among other things, Judge Horn ruled that Respondent's contract claims were neither at issue nor decided in the forfeiture proceeding in the criminal case (AD at 22-3), and that in fact the remedy which he seeks in the court of claims was unavailable in the action in the federal district court (AD at 29). Respondent filed the court of claims action after determining that the proper nature of his claim was not that of a third party in the forfeiture proceeding, but rather a breach of contract action against the government (AD at 17). Judge Horn observed:

> Mr. Bailey's services in the repatriation of the European property went beyond normal criminal representation duties. The proposed discovery on the alleged agreement did not take place [in the federal district court], nor did the proposed hearing on Mr. Bailey's breach claim take

> place during the forfeiture proceeding, which is designed instead to review prior ownership interests and the bona fide, innocent purchaser standards outlined in Section 853. *Plaintiff should be offered an opportunity to have the breach of contract allegations reviewed in court. . . .*
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> * * *
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> *The alleged agreement [between Respondent and the government] appears to have been more of a collaborative effort between the government and Mr. Bailey to rapidly accomplish what was necessary in the attempt to repatriate oversees property,* rather than a standard procurement of goods and services subject to the [Contract Disputes Act]. . . . *Mr. Bailey appears to have been afforded considerable and intentional maneuvering room by the government,* unencumbered by normal [Federal Acquisition Regulation] clauses, constraints and policies, *in order to facilitate a unique and even delicate effort, and to utilize Mr. Bailey's unique knowledge and relationship.*

(AD at 22, 37).

Having decided that Respondent's contract claims were not within the scope of the federal district court rulings and the subsequent appeal to the United States Court of Appeals for the Eleventh Circuit (AD14), Judge Horn set the stage for trial in that case to proceed "in the October/November 2000 time frame. . . . " (AF). In adjudicating whether an express or implied contract was agreed upon and breached, the court will necessarily determine as well whether Respondent held the stock in trust as alleged by the United States government, the premise on which most of the instant complaint is based.

Thus, Respondent respectfully requests that this disciplinary proceeding be abated or stayed pending determination of the court of claims action. *That* is the action in which the pivotal issue of a trust *vel non* will be determined involving the parties between whom it is *directly* at issue. Granting a stay is consistent with the interests of judicial economy and, most importantly, substantial justice. Denying abatement creates the prospect that discipline may be imposed on a premise which may later be disproven in the Court of Federal Claims action. As Respondent argued below, three years elapsed between initiation of this action and the filing of the Complaint (AA at 4-5). Having waited this long, Respondent submits that fundamental fairness requires that this proceeding await the resolution of the Court of Federal Claims case, which is only months away.

In THE FLORIDA BAR v. LUSSKIN, 661 So.2d 1211 (Fla. 1995), this Court distinguished its prior opinion in THE FLORIDA BAR v. WINN, 593 So.2d 1047 (Fla. 1992), and held that a referee in a disciplinary action has discretion to abate the action for good cause. In LUSSKIN, abatement was granted pending the appeal of the attorney's conviction for first-degree murder. This Court pointed out that if the felony conviction was affirmed, it would serve as conclusive proof of the criminal offense, while if it was reversed, "any time spent on disbarment proceedings would have been wasted." *Id.* at 1213, Similarly here, now that the Court of Federal Claims trial is mere months away, a resolution of that case in Respondent's favor will essentially moot the Bar's charges that Respondent mishandled property belonging to others. In its response (AG at 6-7), the Bar pointed out that the

court of claims judgment will create no collateral estoppel because of the non-mutuality of parties. *See* E.C. v. KATZ, 731 So.2d 1268, 1269 (Fla. 1999). Although lacking the preclusive effect of collateral estoppel, the admission of that judgment is available by judicial notice, and its relevance would be indisputable. Indeed, how could the Bar prevail on most of its claims if the Court of Federal Claims has determined that no trust existed? Only by granting a stay to await that outcome can this Court insure against a miscarriage of justice which inconsistent results would create. *See also* COHN v. CITY OF STUART, 702 So.2d 255 (Fla. 4th DCA 1997) (stay granted pending outcome of appeal in federal system).

It bears repeating that Respondent filed his case in the federal court on October 22, 1996 (AD at 8), while the Bar's complaint was not filed until October 1999 (AC at 21). A plethora of Florida cases have held it to be an abuse of discretion to refuse to stay a subsequently-filed state court action in favor of a previously-filed federal action which involves the same parties and the same or substantially similar issues. *See* FLORIDA CRUSHED STONE CO. v. TRAVELER'S INDEMNITY CO., 632 So.2d 217, 220 (Fla. 5th DCA 1994) (citing cases). *See also, e.g.*, CITY OF MIAMI BEACH v. MIAMI BEACH FRATERNAL ORDER OF POLICE, 619 So.2d 447 (Fla. 3d DCA 1993); NATIONAL AMERICAN INS. CO, v. CHARLOTTE COUNTY, 611 So.2d 1284, 1285 (Fla. 2d DCA 1992); SCHWARTZ v. DeLOACH, 453 So.2d 454, 455 (Fla. 2d DCA 1984), *citing* WADE v. CLOWER, 94 Fla. 817, 114 So. 548, 551 (1927).

A primary argument against a stay in such cases is delay due to congestion of the federal court docket CITY

OF MIAMI BEACH at 448. However, here the federal case has been pending for almost four years and is virtually on the eve of trial. Although the causes of action in the disciplinary proceeding and the court of claims case are not the same, that is not dispositive so long as issues involved in both actions are essentially the same. CHARLOTTE COUNTY, *supra;* STATE v. HARBOUR ISLAND, INC., 601 So.2d 1334, 1335 (Fla. 2d DCA 1992). Here, the trust/contract issue permeates both proceedings. Regarding the identity of parties, here the non-identity favors the granting of a stay because only the Court of Federal Claims case involves the very parties who occupy both sides of the underlying dispute, unlike the disciplinary proceeding, and consequently it is the most logical forum for resolution of that dispute.

In sum, Respondent respectfully maintains that judicial economy and fundamental fairness require that the disciplinary proceeding be abated or stayed pending the outcome of the trial in the Court of Federal Claims. To do otherwise could visit a miscarriage of justice upon one of the Bar's most respected and renowned attorneys, unnecessarily doing irreparable harm to his reputation and to his ability to pursue his profession. If the Court grants abatement of the proceeding pending the disposition of the Court of Claims case, the issues raised hereafter need not be met.

II.

In addition, or in the alternative, Respondent respectfully requests a stay of the instant proceeding to permit

him access to highly relevant evidence which is unavailable to him presently.

Testimony of Robert Shapiro

As the accompanying affidavit of F. Lee Bahey (AH) recites, on February 2, 1996 in the United States District Court for the Northern District Court of Florida, Robert L. Shapiro, former co-counsel of Respondent, testified that Respondent had described the arrangement involving the shares of Biochem Pharma stock as a "trust." Respondent's counsel in that proceeding had no reasonable opportunity to cross-examine or impeach Shapiro because Shapiro was a surprise witness, and Respondent's counsel had been in the case for only one day at the time of his testimony. In the instant case, the Referee has denied Respondent's Motion in Limine seeking to exclude Shapiro's testimony (AA at 3), and has ruled that if Respondent wishes to elaborate on Shapiro's testimony, it is his responsibility to depose Shapiro.

Respondent's affidavit recites that he filed an application with the Referee on April 7, 2000 for a commission, valid under California procedure, to compel the deposition of Shapiro. The inter-office memorandum attached to and incorporated in the affidavit recites the steps taken to effect the deposition between April 7 and May 22, 2000, Also attached is the affidavit of Matthew Schwartz, an attorney in good standing with the State Bar of California, recounting his attempts to arrange for the deposition of Shapiro in California. He recited (AH, attachment at ¶ 4-7) that he initiated a California action to issue a subpoena for Shapiro, that California law requires the

subpoena to be personally served not less than 10 days prior to the scheduled deposition, that the deposition was targeted for May 18, 2000, but after four attempts at personal service, his process servers indicated "that they could not personally serve Mr. Shapiro at his offices because of security issues at his law firm. Nobody in his office would advise my process servers as to Mr. Shapiro's actual whereabouts." By the time Schwartz was able to determine the location of Shapiro's personal residence, the 10-day time limit for a deposition on May 18 had expired.

Thereafter, six attempts at personal service by two separate process servers attempting service in time for a deposition on May 26, 2000 failed. "Mr. Shapiro's (apparent) housekeeper indicated to one of my process servers that he was out of town and that he would not be returning home until the week of May 22, 2000." Schwartz recited that the next earliest date for Shapiro's deposition, assuming service is obtained, is June 1, 2000. Moreover, the interoffice memorandum by Respondent's secretary recites that in late May, Schwartz advised her that the California court required certified copies of the order appointing a commissioner, but that such copies could not be obtained because the Referee, Judge Ellis, was on vacation until May 15 "and could not take care of it before then."

Obviously, despite diligent effort, it has proven impossible to depose Shapiro within the presently-scheduled trial date. As Respondent's affidavit recites, the Bar "made no effort to utilize well-known interstate compact proceedings to compel the testimony of said Shapiro." Consequently, proceeding with the trial as presently

scheduled will deny Respondent his due process right to confront "at least by, videotape deposition – which has been arranged – his accuser" (AH at 2). Shapiro's credibility is critical to the resolution of the issues confronting Respondent, and Respondent is requesting a stay of at least 30 days to permit him to serve and depose Shapiro.

Memorandum to Mary Lee Warren

As Respondent's affidavit recites more fully, after the transfer of the Biochem Pharma stock, while Respondent was in Europe on May 19, 1994 attempting to repatriate Duboc's holdings there pursuant to the arrangement with the government, the United States attorney for the Northern District of Florida, P. Michael Patterson and his Criminal Division Chief, Gregory Miller, visited and delivered a memorandum to Deputy Associate Attorney General Mary Lee Warren in Washington "for the purpose of bringing attention to their great success in accomplishing one of the largest criminal drug forfeitures in the United States history." The memorandum to Warren has been kept secret by the United States government ever since. At the hearing on Respondent's motion (AH at 24-27), the court questioned whether the memorandum could be exculpatory after having already been reviewed by Judge Horn and Judge Paul in camera. As Respondent stated, the Bar had subpoenaed Judge Paul to testify, but following a protective order he did not do so and his view of the memorandum is unknown. Counsel argued that the importance of the memorandum required that it at least be produced before Judge Ellis in camera to determine its

relevance. Judge Ellis stated that she is without jurisdiction to compel its production from the federal government (AE at 35), but no such production would be sought. Respondent simply seeks the opportunity to complete his efforts to effect disclosure by Judge Horn in the Court of Federal Claims (AH at 5), and if she denies that request, then to *promptly* file suit to compel disclosure by the United States attorney for the Northern District of Florida. Consequently, Respondent requests a stay for any reasonable time which this Court might set to permit him to obtain the ruling from Judge Horn, or to promptly file suit to compel disclosure.

Conclusion

Based on the foregoing arguments, Respondent respectfully requests that this Court abate the Bar disciplinary proceeding pending the outcome of the trial in the Court of Federal Claims. In addition, or in the alternative, Respondent respectfully requests a stay of the Bar disciplinary proceeding for a minimum of 30 days to permit him to complete the process necessary to depose Robert Shapiro, and/or a stay for a reasonable time within which to seek disclosure of the Warren memorandum by Judge Horn or to *promptly* file suit against the United States attorney for the Northern District of Florida to compel disclosure by that office.

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by facsimile and Federal Express to:

David Ristoff and Debra Joyce Davis, Branch Staff Counsel, The Florida Bar, Tampa Airport Marriott Hotel, Suite C-49, Tampa, FL 33607; and Terrance Edward Schmidt, 1301 Riverplace Boulevard, Suite 1818, Jacksonville, FL 32207-9022, this 24th day of May, 2000.

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